

Recent Changes to the list of Formalities in Scope of the EU Services Directive

As of 1st February 2010, BIS has now received returns from sponsoring departments on almost all legislation affected by the Services Directive and we now have a clearer picture on several areas that affect Local Authorities. This has affected some of the online services on ELMS and for authorities putting their own applications online, may affect priorities. The following is intended as practical advice for authorities.

Formalities recently confirmed as OUT of Scope

The following formalities for which forms have already been created have been deemed out of scope:

- Pet shop licence (Pet Animals Act 1951)
- Scrap metal dealer registration (Scrap Metal Dealers' Act 1964)
- Motor salvage operator registration (Vehicles (Crime) Act 2001)
- Weighbridge operator certificate (Weights and Measures Act 1985)

If Local Authorities receive a challenge on these being excluded from a provision of the Services Directive, they should refer to the relevant sponsoring department, each of whom has committed to indemnify the Local Authority.

For these and other out-of-scope formalities, it is up to the Local Authority whether to have an online application facility or not. If the authority chooses to offer online application it may of course do this using its own form and service or via a deployment on the ELMS forms service. To that extent the issue of scope is academic.

If you wish to deploy the above forms and accept applications through ELMS on them, you may do so. The main operational difference relates to Tacit Authorisation, which is a Services Directive concept and will no longer apply to these formalities.

As a result, for users of the ELMS forms service, "Tacit Consent Permitted" will be set to "No" for each of the above formalities. This will be done centrally in the near future: authorities will need to redeploy the services and an email will be circulated when that can start happening. If you have already deployed on ELMS and wish to withdraw it, you can suspend the service. Should you have already received applications where tacit consent has been offered, the safest course will be just to ensure that the commitment is honoured for those applications.

The following two, for which no forms have been created, were of uncertain scope, but have now been ruled out of scope:

- Street works licence ("Road works" in Scotland) (Section 50, New Roads and Street Works Act 1991; Section 171 Highways Act 1980)
- Gaming machine supply and maintenance certificate (Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985)

Once again, if Local Authorities receive a challenge on these being excluded from a provision of the Services Directive, they should refer to the relevant sponsoring department, each of whom has committed to indemnify the Local Authority.

BIS will take no further action on these so no forms will be made available specifically for these functions nor will the Services Directive team ensure that information about them is available on the BusinessLink family of sites.

Formalities recently confirmed as IN Scope

Animal Movement Notifications:

- Although these are within scope of the Services Directive, BIS concluded that the present notification process was not amenable to being put online. Should any authority be challenged on not offering an online facility for notifications (but not on other matters of non-compliance with the Directive), please refer the challenge to BIS.

Markets:

- BIS has concluded that the establishment of a market is in scope of the Services Directive. At present, there is a form available for occasional markets (e.g. car boot sales, etc.). This form will be extended to cover the requirement of establishing a new, permanent market.
- Licensing of individual stalls under statute or charter may or may not be in scope. If all stalls are only for the sale of goods, an authority has a case that they are out of scope; however, this could be open to challenge. If a stall is offering a service instead of, or as an adjunct to, the sale of goods (common examples would be shoe repairs, key cutting, delivery of flowers) and you licence those stalls, then that is caught by the Services Directive but the responsibility for screening and compliance lies with the authority.
- Finally, it has become clear in some cases that it is not the Local Authority that has statutory control of markets. If it is a town council or other body set up by statute or charter, then that body is the Competent Authority under the Services Directive. Local Authorities should put these bodies in contact with BIS.
- BIS is also working with the Department for Communities and Local Government, the National Association of British Market Authorities (NABMA) and others as part of the inter-departmental working group on retail markets. In addition, LACORS, in consultation with NABMA and BIS, will be issuing further advice and guidance on Markets and The Services Directive very shortly

Leaflet delivery:

- The results so far of Email 2 (part of ELMS Task 8) show that a significant number of authorities require consents for leaflet distribution under the Clean Neighbourhoods and Environment Act 2005, Section 23. BIS considers this to be regulation of a service and will therefore develop a form for this.

Sunbeds:

- Some authorities are already regulating these alongside other personal services such as massage and it is understood that many more will regulate sunbeds shortly. BIS will commission SOCITM Consulting to develop a form for this.

Highway forms:

- “Highway projections” (e.g. awnings, etc.) is believed to be in scope and BIS will extend an existing highway obstruction related form, or develop a new form for this.

Local Acts and other regulation:

- If you regulate a service activity and BIS is not aware of it, you are obliged to ensure that your regulation complies with the Services Directive. Failure to do so leaves your authority open to challenge under the Services Directive. For example, if a service provider was unable to obtain a permit due to the service being absent on the Point of Single Contact on www.businesslink.gov.uk, this would comprise a more than adequate defence for that service provider to take legal action against the individual authority in question. “Email 2” is the way to avoid this situation.
- Returns of Email 2 have indicated that a number of other service activities are regulated, each by a handful of Local Authorities. BIS will ensure that the BusinessLink site indicates that the activity is licensed by the authority. However, an online form will only be provided on the ELMS forms service when the authorities regulating are willing to share the development cost between them. BIS will approach the authorities concerned to take matters forward once it has a nearly complete set of Email 2 returns. In the absence of an agreement to participate in development of an ELMS form, the authority will need to provide its own online service.